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No. 88-857

In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS W. ROSZKOS AND VIVIAN L. ROSZKOS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the waiver of the statute of limitations (Form 872-A) that they executed was terminated by the Commissioner's issuance of a notice of deficiency mailed to the wrong address, with the result that the Commissioner was barred by the statute of limitations from seeking to collect delinquent taxes through mailing a second notice of deficiency to the correct address.

1. a. Petitioners filed joint federal income tax returns for 1973-1976 on which they claimed losses from tax shelter investments. During an audit of their returns for those years, petitioners and IRS officials executed a series of "Form 872" agreements consenting to limited extensions of the ordinary three-year statute of limitations on assessment of deficiencies for those years (see I.R.C.

§ 6501(a), (c)(4)).[1] Late in 1980, petitioners executed Form 872-A agreements (Special Consent to Extend the Time to Assess Tax) for 1973 and 1974 (see Pet. App. 39-44), providing for an unlimited extension of the statute of limitations on assessment of deficiencies for those two tax years. *Id.* at 3-4, 15-16.

Under the terms of Form 872-A, the statute of limitations is extended indefinitely until the agreement is revoked. The IRS can revoke the agreement by mailing to the taxpayer a notice of deficiency or a Form 872-T (Notice of Termination of Special Consent to Extend the Time to Assess Tax). The taxpayer can revoke the agreement by providing a Form 872-T to the IRS office considering his case. Form 872-A provides that the IRS has at least 90 days after termination of the agreement in which to assess the tax, and sometimes longer if a notice of deficiency is mailed.[2]

On December 31, 1981, the Commissioner mailed duplicate copies of a notice of deficiency covering the years 1973-1976 to the two different addresses shown on petitioners' tax returns for those years. In fact, petitioners

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Form 872-A provides in pertinent part (Pet. App. 14-15, 39) that any tax due:

> may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s): or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days.

were no longer living at either of those addresses, and they had so informed the IRS at the time they executed the Form 872-A for 1973 (see C.A. App. 89). Both copies of the notice of deficiency were returned undelivered to the IRS. In May 1982, the IRS assessed the deficiencies. Pet. App. 4.

Sometime thereafter, petitioners learned of the deficiency notice and paid the assessments in late 1982 and early 1983. In June 1984, they petitioned the Tax Court to declare the assessments invalid and to dismiss the case for lack of jurisdiction on the ground that the December 1981 notice did not qualify as a "notice of deficiency" under Section 6212(b)(1) of the Code because it had not been mailed to petitioners' "last known address." After the Commissioner confirmed that the notice had not been sent to the "last known address," he filed a notice of no objection to the requested dismissal, and the Tax Court dismissed the case for lack of jurisdiction. Pet. App. 4-5.

In September 1985, petitioners mailed a Form 872-T to the IRS to terminate the indefinite extension of the statute of limitations to which they had agreed. They added to Form 872-T the following sentence: "This Notice of Termination is filed without waiver of the taxpayers' position that the time to assess tax for the years in question has expired, based on the Service's mailing of a notice of deficiency on December 31, 1981." Thereafter, the Commissioner abated the assessments that had been based on the improperly addressed 1981 notice and refunded to petitioners, with interest, the money that they had paid. Believing that the Form 872-A extensions had not been terminated until petitioners filed the Form 872-T, however, the Commissioner in October 1985 mailed a new notice of deficiency to petitioners' correct address determining deficiencies for the years 1973 and 1974. Pet. App. 4-6, 17.

b. Petitioners filed a timely petition with the Tax Court contesting the October 1985 notice of deficiency.

They claimed, *inter alia,* that the December 1981 notice mailed to the wrong address, while ineffective to commence litigation or collection proceedings, was effective to terminate the Form 872-A agreement, and hence the statute of limitations barred the October 1985 notice. The Commissioner responded that a Form 872-A agreement is not terminated by a misaddressed notice of deficiency that is not received, which essentially is treated as a nullity by the Code, but rather is terminated only by a notice of deficiency that is effective to start the normal procedures for the collection of an income tax deficiency.

A divided Tax Court ruled for petitioners (Pet. App. 13-33). The majority acknowledged that "an improperly addressed notice of deficiency * * * which does not have the potential to advise a taxpayer of the intended termination by [the IRS], would not suffice to terminate the parties' agreement" (*id.* at 22). But the majority held that "a fair reading of the parties' agreement" was that the notice became effective to terminate the extension once petitioners learned that it had been sent (*ibid.*).

Judges Simpson and Parker dissented (Pet. App. 31-33). They maintained that the majority opinion was inconsistent with "the cardinal principle of interpretation * * * that the Court should attempt to give effect to the intentions of the parties to the agreement" (*id.* at 31). The dissenters noted that, when a Form 872-A agreement is terminated, "the Commissioner is given a period of time within which to issue his notice of deficiency and commence the tax collection procedures" (*id.* at 32). The dissenters accordingly further stated that, "[s]urely, no one can doubt that when the parties executed the extension, they contemplated that it could only be terminated by a Form 872-T or a notice of deficiency that would be effective under section 6213 to commence the tax collection procedures, or that would have been their contemplation

if they had thought about the matter" (*id.* at 33). The dissenters therefore concluded that the mailing of an ineffective notice of deficiency to the wrong address should not operate to provide a taxpayer with "the windfall of never having to prove that he did not owe the tax claimed by the Commissioner" (*ibid.*).

c. The court of appeals vacated the Tax Court's decision and remanded for further proceedings (Pet. App. 1-12). The court explained that the notice of deficiency is "intended to serve as a vehicle of notification" (*id.* at 8). Accordingly, "a notice of deficiency which does not satisfy the minimum statutory requirement for notice cannot reasonably be considered a notice of deficiency" under the agreement (*ibid.*). The court reasoned that "a misaddressed notice of deficiency, which is returned to the IRS undelivered, is 'null and void' " unless "the taxpayer acknowledges notice by timely petitioning the Tax Court for a redetermination of deficiency, thereby rendering harmless the IRS' error in mailing" (*id.* at 9-10, quoting *Mulvania* v. *Commissioner*, 769 F.2d 1376, 1379 (9th Cir. 1985)), and therefore the misaddressed notice in this case was null and void. The court concluded that "the Form 872-A reference * * * was [not] intended to include a misaddressed, undelivered, and unacknowledged letter which would not qualify as a notice of deficiency in any other context"—an interpretation that "gives meaning to the entire * * * waiver form," including the detailed provision for when the IRS may assess a tax deficiency for the period covered by the waiver (Pet. App. 10).

2. Petitioners contend that the misaddressed notice of deficiency mailed by the IRS in 1981 operated to terminate the extension of the assessment period under the terms of the Form 872-A agreement. The court of appeals correctly construed that agreement between the parties in rejecting petitioners' contention. Moreover, the decision below,

which involves no question of statutory or constitutional interpretation but concerns only the construction of a form agreement, does not conflict with any decision of this Court or of another court of appeals.[3] Accordingly, review by this Court is not warranted.

Permitting the Form 872-A extension to be terminated by a notice of deficiency that is ineffective for tax collection purposes is not consistent with either the terms or the spirit of the parties' agreement. The agreement, which permits completion of the normal audit process, contemplates that the extension will continue until one of the parties decides to terminate it, and that an adequate period will be provided for the collection of taxes following termination. The mailing of an improperly addressed notice of deficiency that is not received imposes no obligation on the taxpayer and does not commence the collection process. Clearly, such a mailing is not intended by the Commissioner to terminate the extension, and a taxpayer's subsequent awareness that there was such a misaddressed mailing is not a determination by the taxpayer, or a communication to the IRS, that the extension should be terminated. And, because the notice is a nullity that imposes no obligation on the taxpayer, there is no logical reason why it should operate to terminate the extension. In short, there is no reason to believe that "the intentions of the parties to the agreement" (Pet. App. 31 (Simpson, J., dis-

[3] Petitioners argue (Pet. 6-7) that the Court should grant certiorari because a conflict in the circuits *may* arise as a result of appeals now pending in the Third and Sixth Circuits. But there is no reason to expect that either of those courts of appeals will disagree with the Ninth Circuit's decision in this case. Moreover, even if there were a conflict in the circuits on the question presented, it is not apparent that it would warrant resolution by this Court since, as the Tax Court explicitly noted (Pet. App. 22 n.8), acceptance of petitioners' contentions would not preclude the IRS from revising the terms of Form 872-A.

senting)) contemplated termination of the extension by the mailing of "a misaddressed, undelivered, and unacknowledged letter which would not qualify as a notice of deficiency in any other context" (*id.* at 10).

The terms of Form 872-A support this common sense conclusion that the agreement does not contemplate termination by a notice of deficiency that is ineffective for tax collection purposes. Form 872-A expressly provides that, when the extension is terminated by the mailing of a notice of deficiency, the time for making an assessment is extended for 60 days beyond the time that the assessment is "prohibited." The prohibition on assessment referred to is the bar on assessment and collection until the expiration of 90 days after the mailing of the notice of deficiency, during which time the taxpayer can file a petition for Tax Court review (I.R.C. § 6213(a)). Thus, it is apparent that the reference in Form 872-A to a notice of deficiency pertains to a notice that commences the normal statutory collection procedures, including the running of the period for seeking review by the Tax Court; a misaddressed notice of deficiency that is not received does not qualify.

Contrary to petitioners' contention (Pet. 9-11), the decision below does not undermine the taxpayer's right to a prepayment forum; indeed, petitioners' argument highlights the correctness of the decision below. If the notice of deficiency had triggered the period during which the taxpayer could petition the Tax Court, it is undisputed that it would have terminated the Form 872-A extension. It is precisely because the misaddressed notice did not trigger that period, and hence had no effect on the taxpayer or the collection process, that the court of appeals held that termination of the extension was not within the contemplation of the parties to the agreement. Petitioners retain their right to a prepayment forum under the decision below; indeed, this case originated in the Tax Court when

petitioners invoked that right in response to the correctly addressed notice of deficiency. What petitioners would achieve by reversal of the decision below is not access to a prepayment forum, but rather the windfall benefit of not having to contest at all the Commissioner's claim that they owe additional taxes. The court of appeals correctly held that the parties did not intend that result when they executed Form 872-A.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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